technical performance and signal quality standards applicable to all cable channels.[37]

By rewording Section 624(e), Congress effectively conformed the statutory language to the Commission's longstanding policy that there was no conflict between technical standards on the one hand and facilities and equipment requirements on the other hand. Congress also expressly permitted a franchising authority to seek a waiver from the FCC to require more stringent performance standards.

C. Other Provisions of Title VI

At least three provisions of Title VI of the Act are relevant to a full analysis of the effect of the 1996 Act amendments to Section 624. First, Section 632 from the 1984 Act authorized franchising authorities to enforce any provision in a franchise which contains "construction schedules and other construction-related requirements of the cable operator. . .to the extent not inconsistent with this title." Section 632 was amended in the 1992 Act to expand the explicit authority of franchising authorities. As amended in 1992, Section 632(a) provided that a "franchising authority may establish and enforce

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[37] In fact, the Commission had already adopted such regulations prior to the enactment of the 1992 Act. (Report and Order, Cable Television Technical and Operational Requirements, MM Docket 91-169, Released: March 4, 1992 ("1992 Technical Report and Order")) In the 1992 Technical Report and Order, the Commission indicated its continued belief that "the local franchising authorities are the proper initial focus of any complaint about the quality of technical service provided by a cable operator."
(Id. at ¶ 81)

. . .(2) construction schedules and other construction-related requirements, including construction-related performance requirements, of the cable operator." The legislative history indicates that "Section 632(a) allows franchising authorities to establish and enforce, as part of a franchise, or franchise renewal, modification or transfer, customer service requirements, construction schedules and other construction-related requirements." (Conf. Report, H.R. 862, 102d Cong., 2d Sess. (1992) at 78) There was no amendment to subsection (a) in the 1996 Act.

Second, Section 626 provides generally that in the context of a franchise renewal a franchising authority should identify its cable related community needs and interests and determine whether the cable operator's proposal for renewal is reasonable to meet such needs and interests and, if so, whether the operator has the technical ability to fulfill its proposal. Section 626 has provided continuously since 1984 that "[s]ubject to Section 624, any . . .[proposal for renewal]. . .shall contain such material as the franchising authority may require, including proposals for an upgrade of the cable system." (Emphasis added) In the legislative history to the 1984 Act, Congress indicated that the authority to require upgrades was limited only by Section 624(b). (1984 H.R. Rep., No. 934 at 73) Subsection (b) does not affect the fundamental authority to require channel capacity for the distribution of video programming.

Finally, the fact that Title VI recognizes the authority of a franchising authority to revoke a franchise for cause is relevant to a complete analysis of new Section 624(e). (See, e.g., Section 627(b) and Section 626(i))

D. Meaning of 1996 Act Amendments

Thus, on the eve of the 1996 Act amendments, the following conclusions were warranted: (1) The term technical standards as used in Section 624 of the Act and as applied by the Commission included performance and signal quality standards but not "facilities" and "equipment," e.g., studio capacities, or electrical safety standards or construction requirements as such; (2) franchising authorities could enforce the Commission's technical standards by provisions in franchises including, e.g., penalty or liquidated damages provisions throughout the term of the franchise; (3) franchising authorities could enforce the Commission's technical standards by revocation of a franchise or by denial of renewal; (4) franchising authorities were considered by the Commission to be the initial enforcers of service quality complaints irrespective of specific franchise provisions; (5) franchising authorities could require facilities and equipment in franchises and provisions for the enforcement of same; and (6) Section 632(a) of the Act permitted a franchising authority to require construction requirements in a franchise.

In this context, the 1996 Act amendments to Section 624(e) are best understood by Congress as an effort (1) to ensure a single set of uniform national technical performance and signal

quality standards; and (2) to eliminate a patchwork of remedial provisions for non-compliance with such standards in favor of a uniform national policy. The Commission is vested with the exclusive authority to impose penalties and corrective actions for non-compliance of its technical standards while the exclusive authority to revoke franchises or deny renewals based on inferior technical performance and signal quality rests with the franchising authority.

The addition of the new sentence which prohibits a franchising authority from requiring specific subscriber equipment or "transmission technology" must also be read in harmony with other clear statutory provisions. The prohibition against requiring specific subscriber equipment can be harmonized with the authority to require facilities and equipment because there is a clear distinction between the authority to require, by franchise, that a cable system be capable of addressability and a requirement that certain services or service packages be distributed only through the use of specific addressable converters or other equipment.

Finally, the term "transmission technology," although capable of broad construction, may be harmonized with the authority of franchising authorities to impose construction and upgrade requirements, pursuant to Section 632(a) and Section 626(a), respectively. Indeed, the term "transmission technology" is best understood in relation to the facts described by the Commission's Cable Services Bureau in its Memorandum Opinion and Order in

CSR-4291-Z, DA 96-260, Released: February 29, 1996. There the Cable Bureau described actions of the State of New Hampshire legislature (a state)[18] and the Town of Chapel Hill (a franchising authority) designed to require cable operators to eschew scrambling of services which would require specific equipment, i.e., an addressable converter, at an additional monthly charge to receive such services. The Commission held that Section 624(e), as amended, preempted such efforts. The meaning of "transmission technology" should be limited to similar circumstances.[19] In short, transmission technology should be interpreted only as a description of the means a cable operator may use to deliver video programming or programming packages to subscribers and not as a description of the full potential of a cable system. This interpretation preserves a balance among all relevant statutory goals and objectives and avoids any conflict between new Section 624(e) and other surviving, unamended provisions of the statute. A broader reading is unwarranted absent any legislative history to inform the meaning of the new

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[18] As noted, the amendment to Section 624(e) prohibits any "state or franchising authority from imposing conditions on the use of equipment or transmission technology." It is particularly interesting that prior to the 1996 Act, Section 624, unlike other provisions of Title VI of the Act, did not empower a "state" as such to exercise any authority with respect to the facilities and equipment of a cable operator. Thus, the inclusion of "state" is significant evidence that Congress was aware of the declaratory ruling pending at the Commission and intended only to address and resolve the facts as presented in the petition.

[19] The use of subscriber taps would be another example of a type of equipment or technology that the amended statute does not permit franchising authorities to mandate.

term and would only wreak havoc with an established regulatory scheme and invite litigation.

V. Small Cable Operators -- Rate Relief

A. Deregulate Franchise by Franchise

In Section 301(c) of the 1996 Act, Congress provides immediate relief from rate regulation for small cable operators. A "small cable operator" is a cable operator that serves fewer than 1% of all cable subscribers nationally with gross annual revenues less than $ 250 million. Affiliates count. In any franchise area where the number of its subscribers does not exceed 50,000, a small operator receives rate relief "with respect to (A) cable programming services, or (B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994." (1996 Act, § 301(c), emphasis added) There is no other condition. Only the size of the company and the scope of its operations matter. Accordingly, we agree with the Commission's tentative conclusion in paragraph 87 of the NPRM that "[a]lthough a single cable system can serve more than one franchise area, deregulation . . . appears to be determined on a franchise area-by-franchise area basis, without regard to the total number of system subscribers."

B. Change in Single Tier of Basic Service

In paragraph 89, the Commission asks whether Congress intended a Basic Service Tier to be deregulated where a small operator created a CPS tier after December 31, 1994. This is among the more difficult questions for the Commission in this

proceeding. On the one hand, the statutory language refers only to the status of a cable operator's service offerings as of December 31, 1994. On the other hand, this section is an exception both to the general statutory scheme that effective competition precede total rate deregulation and the 1996 Act amendment that CPS tiers shall not be uniformly deregulated until March 31, 1999. Moreover, both the Congress and the Commission have repeatedly emphasized the benefits of a low cost basic service for subscribers and for competition in the video marketplace generally.

Since it is not possible, however, to reconcile all competing objectives with a determination that a cable operator's expansion of the number of tiers after December 31, 1994 should restore the basic tier to regulation, the better Commission should apply the statute literally at this time. If the Commission decides otherwise, it should minimize regulatory burdens by adopting a streamlined procedure for determining reasonable basic service rates in such limited circumstances.

C. Procedure to Establish Exemption

In paragraphs 28 through 30 of the NPRM, the Commission describes the procedure under its interim rules whereby an eligible small operator may establish its exemption from rate regulation. In paragraph 91, the Commission states its intent to adopt the interim rules on a permanent basis. We agree that the procedure for establishing a small cable operator's exemption from rate regulation should not be administratively burdensome

and we generally support the procedure proposed by the Commission.

D. Installation and Equipment Deregulated

Although not mentioned by the Commission, Section 301(c) does not expressly address the issue of whether rate deregulation of small operators includes deregulation of installation and equipment rates. Similarly, the Commission does not consider whether deregulation of small operators without a specific finding of the existence of effective competition relieves such operators from the uniform rate or tier buy-through provisions of the Act. With respect to the former, it appears that regulation of equipment depends on whether the regulation of a cable system's Basic Service Tier is subject to effective competition so that whenever the basic tier is deregulated, equipment rates are deregulated as well. With respect to the latter, reference to the legislative history supports a determination that deregulation of small operators is tantamount to an express finding that such operators are subject to effective competition. In this regard, the House Report provides: "[i]mposing a uniform rate structure requirement on services that are not regulated is unnecessary since, in those instances, market forces are actively working to ensure reasonable rates." (H.R. Rep., No. 204, 104th Cong. 1st Sess. (1995) at 109) (emphasis added)

VI. Uniform Rate Requirement

A. Impact of Effective Competition Exists

As part of Section 301(b), Congress amends Section 623(d) of the Act to eliminate the requirement for a uniform rate structure in markets with effective competition. Prior to the 1996 Act, Section 623(d) provided that: "A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system." The Commission had determined that this provision applied to all cable systems irrespective of the issue of effective competition. In Time Warner Entertainment v. FCC, supra, the Court of Appeals for the District of Columbia held that since a statutorily mandated uniform rate requirement "is clearly a form of rate regulation," it cannot apply to systems subject to effective competition consistent with Section 623(a)(2). The instant amendment conforms the statute to the ruling of the court and also clarifies that uniformity in rates does not apply to per channel or per event services.

B. Bulk Discounts -- MDU Defined

In addition, the amendment carves out an exception from rate uniformity even where there is no effective competition. Specifically, Section 301(b)(2) provides that "[b]ulk discounts to multiple dwelling units. . .[MDUs] . . .shall not be subject to this subsection, except that a cable operator may not. . .charge predatory prices to a multiple dwelling unit." In paragraph 98

of the NPRM, the Commission tentatively concludes that the bulk rate exception should be limited to discounts negotiated directly by the cable operator and the property owner or manager. The Commission also seeks comment on whether bulk discounts should be available to MDU residents who are billed individually. In paragraph 99 of the NPRM the Commission asks for comment on the meaning of "Multiple Dwelling Unit" including whether it should be interpreted to correspond with the expanded "private cable exemption" created by Section 301(a)(2) of the 1996 Act.[20]

As the new exception from rate uniformity only has meaning as an opportunity for regulated cable operators "to respond to competition at multiple dwelling units," it follows that the Commission's rules should recognize that the exception is available regardless of billing arrangements. We also believe that it is appropriate for the Commission to interpret MDU on a broader basis, e.g., to include mobile home parks and planned and resort communities, consistent with the amended private cable exemption to the cable system definition.

C. Predatory Pricing -- State Regulation

Finally, the Commission states its belief that "allegations of predation should be made and reviewed under principles of federal antitrust law as applied and interpreted by the federal courts" and requests comments on the appropriate standards for a prima facie case. (NPRM at ¶ 100) The Commission

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[20] Section 301(a)(2) amends the definition of "cable system" in Section 602(7) of the Act to "exclude any facility that serves subscribers without using any public right-of-way "

proposes to employ the procedures for adjudicating claims of predatory pricing that apply to the adjudication of program access complaints pursuant to Section 76.1003 of its rules. It is the view of NYSDPS that the Commission has failed to distinguish between predatory pricing that may be violative of state antitrust laws generally regardless of rate regulation, Total TV v. Palmer Communications, 69 F.3d 298 (U.S.C.A., 9th Cir. 1995) and predatory pricing that conflicts with the specific exception to rate uniformity in the 1996 Act amendment. While it is not clear that the Commission must necessarily have exclusive jurisdiction over the issue of predation in the context of Section 623(d), as amended, or that federal law must apply, the Commission should clarify that the holding in Total TV is not preempted by the 1996 Act or its rules.

VII. Buy-Out Prohibition

Section 302(a) of the 1996 Act adds three new provisions to Title VI including Section 652 entitled "Prohibitions on Buy Outs" which limits the circumstances in which a LEC or LEC affiliate and a cable operator may purchase one another's facilities or operate a cable or telephone system as a joint venture. One exception to the prohibition on buy outs or joint ventures is contained in Section 652(d)(2) of the Act which provides that a LEC:

> . . .may obtain, with a concurrence of the cable operator on the rates, terms and conditions, the use of that part of the transmission facilities of a cable system extending from the last multi-user terminal to the premises of the end user, if such use

> is reasonably limited in scope and duration, as determined by the Commission.

The Commission has adopted interim procedures set forth at Section 76.1404 which provide for the filing of any contract permitting such joint use with the Commission within ten days of execution and service of a copy of the contract on the franchising authority along with notice of the franchising authority's right to file comments with the Commission. We believe that it is essential that franchising authorities be given an opportunity to comment and we support the interim rule. In addition, we note that the Commission states it will evaluate joint use agreements on a case-by-case basis with reference to "the underlying policy goals" of the Act which, as described by the Commission, are "to promote competition in both services and facilities, and to encourage long-term investment in the infrastructure." NYSDPS agrees with this general approach.

VIII. Advanced Telecommunications Incentives

The Commission seeks comment on how it can advance Congress' goal stated in the 1996 Act to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms). . . ." (NPRM at ¶ 109) The NYSDPS believes that the cable industry will play an important part in delivering broadband communications services regardless of whether such services squarely fit the definition of advanced telecommunications or interactive video services. In

essence, the technology deployed and services offered by cable operators are converging with advanced telecommunications services, so that in the formulation of policy for implementing advanced telecommunications, universal service discounts and funding mechanisms should include the cable industry as a key player. For example, the cable industry in New York has wired thousands of serving over two-thirds of the state's students and provides over 500 hours of "cable in the classroom" video programming to such schools free of charge. In addition, the cable industry is engaged in a two-way video distance learning trial in numerous locations in the state. These efforts plus future plans should be recognized in any policies or regulation regarding the deployment of advanced telecommunications for schools and libraries.

CONCLUSION

NYSDPS is supportive of the Commission's pro-competitive stance evident in the Order and NPRM. The LEC presence in the video marketplace cannot be underestimated as a potential constraint on cable television rates. Congress clearly acknowledged the considerable weight of such a LEC presence when it allowed cable deregulation without a threshold penetration test. Small cable operators are particularly affected by DBS and merit the special consideration accorded them by Congress and the Commission.

The NYSDPS takes its consumer protection role very seriously especially during this transitional period to a

competitive telecommunications environment. Our comments stress the authority inherent in our powers as a franchising authority to adopt customer service requirements, to provide for adequate system capacity, to monitor technical compliance and generally to ensure safe, adequate and reliable service. It is a traditional role underscored by Congress in 1984 and 1992 and protected in the 1996 Act.

Despite all the cable company consolidation and clustering of systems, the cable television industry still remains closely involved in each community that it serves. In this era of rapid technological change and national, if not global, policy concerns, it is important to remember the indispensable role played by the franchising authority at the state and local level.

Our comments support strengthening that role consistent with Congressional intent not only to streamline deregulation and encourage competition, but most significantly to protect and benefit consumers.

Respectfully submitted,

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